85-1417

Supreme Court, U.S.
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No.

In The
Supreme Court Of The United States

JANUARY TERM, 1986

STEPHANIE TYLER-BARCOMB and
FREDERICK S. BARCOMB, JR.,
Petitioners,

v.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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Questions Presented

(1) Whether or not the Petitioners knowingly and intentionally waived their right to separate counsel.

(2) Whether or not the record in this case adequately supported the Petitioners' claim that their fifth amendment rights were violated by the admission of evidence indicating that they were silent in the face of accusation after being warned of their right to remain silent.

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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1986

NO. .....

STEPHANIE TYLER-BARCOMB and
FREDERICK S. BARCOMB, JR.,
Petitioners,

V.

STATE OF CONNECTICUT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The above-named Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court entered in this proceeding on December 3, 1985.

Opinions Below

The opinion of the Connecticut Supreme Court as reported at 197 Conn. 666 (December 3, 1985) appears in the Petitoners' Appendix hereto.

Jurisdiction

The judgment of the Connecticut Supreme Court was entered on December 3, 1985. A timely motion to reargue was denied on December 20, 1985, and this petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

Constitutional Provisions Involved

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the wetnesses against him; to have

compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Questions Presented

(1) Whether or not the Petitioners knowingly and intentionally waived their right

to separate counsel.

(2) Whether or not the record in this case adequately supported the Petitioners' claim that their fifth amendment rights were violated by the admission of evidence indicating that they were silent in the face of accusation after being warned of their right to remain silent.

Statement of the Case

Proceedings to Date

In this criminal prosecution, Co-Petitioner, Federick S. Barcomb, Jr. was charged in a two-count Information. The first count alleged that on or about July 15, 1980, Co-Petitioner Barcomb committed the crime of sexual assault in the second degree in violation of Connecticut General Statutes Section 53a-71(a)(1). The second count alleged that Co-Petitioner Barcomb committed the crime of risk of impairing

the morals of a child under 16 years of age in violation of Connecticut General Statutes Section 53-21.

Co-Petitioner, Stephanie Tyler-Barcomb, was charged in a one-count Information alleging that Co-Petitioner Tyler-Barcomb with both willfully causing and permitting a child under the age of sixteen years to be placed in a situation where her morals were likely to be impaired and with doing certain acts likely to impair the morals of that child, in violation of Connecticut General Statutes Section 53-21.

The Petitioner pled not guilty to these charges and trial commenced before a jury of six on March 3, 1982. Both Petitioners were represented at all stages of the pre-trial and trial proceedings by the same counsel, Attorney Konstant W. Morell. On March 11, 1983, guilty verdicts

were returned on the aforesaid counts against each Petitioner.

On March 19, 1982, the Court denied the respective Motions To Set Aside The Verdict of each Petitioner. The Petitioner Barcomb was then sentenced to a term of incarceration of not less than two and one-half years nor more than five years on each count, with said sentences to run consecutively, for an effective prison sentence of not less than five years nor more than ten years. On the same date the Petitioner Tyler-Barcomb was sentenced to a term of imprisonment of not less than two and one-half years nor more than five years. Both Petitioners filed timely notices of appeal and were enlarged of $25,000 appeal bonds.

Present counsel filed an appeal of Petitioners' convictions to the Connecti-

cut Supreme Court . On December 3, 1985, the Connecticut Supreme Court affirmed the convictions. On December 12, 1985, Petitioners filed a Motion To Reargue their appeal which was denied on December 20, 1985. A motion was therafter filed to stay the execution of Petitioners' sentences while they sought this writ of certiorari from the Supreme Court of the United States. That motion was granted January 16, 1986.

Factual Background

The facts that the Connecticut Supreme Court found a jury could reasonably have found were as follows:

> "The victim of the crimes, the defendant Tyler-Barcomb's daughter, was between twelve and thirteen years old at the time of the alleged incidents. The defendant Barcomb, the then live-in boyfriend of Tyler-Barcomb, sexually abused the child a number of times between June, 1980, and June, 1981. Tyler-Barcomb knew what Barcomb had been doing and yet did nothing to pre-

> vent further abuse. Tyler-Barcomb also knowingly had sexual intercourse with Barcomb in the presence of her daughter." (Tyler-Barcomb at 669).

On appeal Petitioners claimed they were denied their right to effective assistance of counsel in that they were represented by the same counsel during trial. This issue was raised for the first time on appeal.

Also, on appeal for the first time Petitioners claimed that their constitutional rights were violated by the admission of evidence indicating that they were silent in the face of accusation after being warned of their right to remain silent.

Both these claims were considered by the Connecticut Supreme Court since they were claiming a deprivation of a fundamental constitutional right and a fair trial. See State v. Evans, 165 Conn. 61,

69 (1973). State v. Wright, 197 Conn. 588, 595 (1985).

Rulings on the Issues

On the issue of the right to separate counsel the Connecticut Supreme Court found that the Petitioners knowingly and intelligently waived their right to separate counsel. This finding was based on three separate hearings on the matter which are fully set forth in the Appendix hereto. (App. B(1)pp.22a-32a). The text of the Court's ruling in this regard is at pp. 669-671 of its opinion. (App. A(1), pp. 1a-14a).

On the issue of silence of Petitioners after their advise of rights the Connecticut Supreme Court found as follows:

> "The record in this case, however, is unclear as to whether the defendants have made out a viable fifth amendment claim." (Tyler-Barcomb, at p. 675).

The full opinion of the Court on that

issue is at pp. 675-676 of its opinion fully set forth in the Appendix hereto. (App. A(1), pp.1a-14a). The full testimony of both State Police officers who met with Petitioners and advised them of their rights is also set forth in full in the Appendix. (App. B(2), pp. 32a-35a).

REASONS FOR GRANTING THE WRIT

This case raises a substantial federal question as to what constitutes a knowing and intentional waiver of the right to separate counsel. Furthermore, the ruling of the Connecticut Supreme Court is contrary to the rulings of federal courts on this issue.

Additionally, the record before the Connecticut Supreme Court clearly was an adequate one from which a violation of the rule of this Court in Doyle v. Ohio, 426 U.S. 610 (1976) should have been found.

(1)

The Petitioners Did Not Make a Knowing and Intentional Waiver of Their Right to Separate Counsel and Were Denied Their Constitutional Right to Effective Assistance of Counsel by Their Joint Representation.

The three separate inquiries by the trial court as to the possibility of a conflict of interest in the joint representation of Petitioners was insufficient to form the basis for a knowing and intentional waiver. See Festo v. Luckhart 191 Conn. 622, 626-631; State v. Marion, 175 Conn. 211, 219 (1978). The trial court did not alert the Petitioners to the substance of the dangers and risks of dual representation in sufficient detail. There was no inquiry as to specifically what dangers, if any, Petitioners' counsel had informed each Petitioner of. There was no inquiry

as to Petitioners' educational background in an attempt to ascertain whether Petitioners had the capacity to make a rational decision in this regard. Neither Petitioner was asked for a narrative response in which they could personally articulate in detail their view of what counsel had explained to them, and of their intent to forego a significant constitutional right and protection. The trial court's attempted explanation and inquiry, in its most lengthy form, took place on the first day of trial without any showing whether each Petitioner had had a reasonable time to digest and think about the risks inherent in dual representation. The lack of understanding of what they were doing was most clear when Petitioner Tyler-Barcomb responded affirmatively when asked by the trial court if the court had told her "what the legal

standard is for effective representation." In fact, the trial court had not set forth in these inquiries "the legal standard for effective representation".

The case as tried clearly presented actual conflicts of interest damaging to both Petitioners. The trial court's inquiry concerning waiver of the right to separate counsel was insufficient to have a finding that Petitioners made a knowing and intentional waiver in this regard.

(2)

The Record Adequately Supports the Petitioners' Claim That Their Fifth Amendment Rights Were Violated by the Admission of Evidence Indicating That They Were Silent in the Face of Accusation After Being Warned of Their Right to Remain Silent.

On two occasions, on two consecutive days of a five-day trial, the State's Attorney elicited testimony in his case-in-chief (not in an attempt to impeach the Petitioners during their case) from the two State Police officers who investigated the victim's allegations, that these Petitioners asserted their right to remain silent on each of the two occasions when visited by these officers, on Saturday, June 13, 1981, and two days later on Monday, June 15, 1981. [Emphasis added.] It is unclear whether their silence came be-

fore or after they were given their Miranda rights on each of these two occasions, if each occasion is considered separate and distinct from the other. However, in the continuum and chronological order of the officers' investigation and meetings with these Petitioners, it is extremely clear their silence on the second visit of Monday, June 15, 1981, was preceded by the advise of their Miranda rights on Saturday, June 13, 1981. [Emphasis added.]

On March 4, 1982 Trooper John Hardell testified that early on the morning of Saturday, June 13, 1981, he went to the Tyler-Barcomb residence and "explained the situation" to the Petitioners. This explanation included the advise of rights. (App. B(2), pp.32a-35a). After that first visit by these law enforcement officers there was a second visit on Monday,

June 15, 1981, by both Hardell and Sgt. Mary Heroux as testified to by Sgt. Heroux on March 9, 1982. (App. B(2), pp.32a-35a).

Thus, it can be seen that there is a clear record on which post-Miranda silence occurred on the second visit and was admitted erroneously at the trial. The record is very clear that there were two visits by these officers, not only one on June 15, 1981, as stated at page 675 of the Connecticut Supreme Court's opinion. [Emphasis added.] The admission of the Petitioners' silence at that meeting after their advise of rights two days earlier at the June 13, 1981 meeting was constitutionally impermissible. The record here does adequately support Petitioners' claim of a clear deprivation of their fifth amendment rights. In this respect, we submit that the Connecticut Supreme Court erred in its review of the testimony con-

cerning these two meetings. There exists a very clear record that the Petitioners were given their Miranda rights on Saturday, June 13, 1981, before they stated on Monday, June, 15, 1981, that they did not wish to speak with these officers.

In Doyle v. Ohio, 426 U.S. 610 (1976), the United States Supreme Court held that the defendants' post-Miranda warning silence may not constitutionally be used by the prosecution either for substantive or impeachment purposes.

Two reasons were advanced by the Court in support of its decision. First, implicit in advising a defendant that he has the right to remain silent is an assurance that exercise of that right will carry no penalty. Because the silence was induced by governmental action, "it would be fundamentally unfair and a deprivation of due process

to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." 426 U.S. 618. Second, evidence of silence lacks sufficient probative value because there is no assurance that silence in the wake of the warnings is nothing more than exercise of the right. Thus, evidence of silence is "insolubly ambiguous." 426 U.S. 617.

In reaching its decision, the Court made no distinction between custodial/non-custodial interrogation or the pre-arrest/post-arrest status of the defendant. In Jenkins v. Anderson, 447 U.S. 231 (1980) the Supreme Court reviewed a case involving impeachment with pre-arrest silence, but concluded that no constitutional violation had resulted because the defendant voluntarily testified and the fact of

silence was used only for impeachment purposes. Most significantly, no Miranca warning had been given and therefore the silence had not been ~~i~~nduced by governmental action. [Emphasis added.]

This matter differs from Jenkins in several critical respects. At the time of both interviews, June 13 and June 15, 1981, the two State Police officers told the Petitioners that serious charges had been made. The Miranda warnings were first issued on Saturday, June 13, 1981, and then on Monday, June 15, 1981, the Petitioners asserted their right to silence subsequent clearly to the June 13th warnings. [Emphasis added.] Their silence was not used to impeach inconsistent testimony at trial, but was elicited in the State's case-in-chief.

At least three federal Courts of Appeal have reached the issue of use of prior silence in the government's direct case. In United States v. Caro, 637 F.2d 869, 876 (2d Cir. 1981) the Second Circuit stated that it could find "no decision permitting the use of silence, even the silence of a suspect who has been given no Miranda warnings and is entitled to none, as part of the Government's direct case." See also, United States v. Lewis, 651 F.2d 1163, 1165-69 (6th Cir. 1981); United States v. Nabors, 707 F.2d 1294, 1298 (11th Cir. 1983).

This Court and several Courts of Appeal have addressed the question whether the inadmissibility of post-Miranda silence depends on the pre-arrest or post-arrest status of the defendant. The Supreme Court, in

Fletcher v. Weir, 455 U.S. 603 (1982) (per curiam) discussed the issue in the context of deciding whether the post-arrest status of the defendant alone, the absence of Miranda warnings, precluded use of silence for impeachment purposes. The Court reviewed its prior decisions and emphasized that the critical factor was the inducement, by governmental action, of the defendant's silence in response to the warning. "In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand." 455 U.S. at 607. See also, United States v. Greene, 698 F.2d 1364, 1374 (9th Cir. 1983). ("Thus, it is the affirmative

assurance, implicit in the giving of Miranda warnings, that one's silence will not be used against him that triggers the protections of the due process clause."); United States v. Williams, 665 F.2d at 109-110 (reversible error in the admission of defendant's partial silence during the court of pre-arrest questioning, focusing on importance of the warning and ambiguity of a refusal to answer); Bradley v. Jago, 594 F.2d 1103 (6th Cir. 1979) (emphasis on Miranda warning as critical factor); United States v. Nabors, 707 F.2d 1294 (impliedly concluding that warning is the controlling factor).

The admission of the testimony concerning Petitioners' silence of Monday, June 15th, after the advise of rights on Saturday, June 13th, and in the

State's case-in-chief, constituted error; and there is a clear record upon which this Court can so find.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Connecticut Supreme Court.

Respectfully submitted,

PETITIONERS,

BY: F. MAC BUCKLEY, ESQ.

Counsel of record

Buckley & Santos, P.C.

51 Russ Street

Hartford, CT. 06106

Dated: February 12, 1986

CERTIFICATION OF SERVICE

THIS IS TO CERTIFY THAT three (3) copies of a Petition For A Writ Of Certiorari with attached Appendix were mailed this 18th day of February, 1986, to:

Terrence Sullivan, Esq., State's Attorney for the J.D. of Windham at 108 Valley Street, Willimantic, CT. 06260;

Susan C. Marks, Special Assistant State's Attorney at the Office of the Chief State's Attorney, 100 South Turnpike Road, P. O. Box 5000, Wallingford, CT. 06492, and,

John M. Massameno, Esq., Assistant State's Attorney at the office of the Chief State's Attorney, 100 South Turnpike Road, P. O. Box 5000, Wallingford, CT. 06492.

THE PETITIONERS

BY: F. Mac Buckley

F. MAC BUCKLEY
Their Attorney

APPENDICES

APPENDIX A (1)

Decision of Connecticut Supreme Court, 197 Conn. 666, (published December 3, 1985)

STATE OF CONNECTICUT v. STEPHANIE TYLER-BARCOMB

STATE OF CONNECTICUT v. FREDERICK S. BARCOMB, JR.

(11362)

(11363)

PETERS, C. J., HEALEY, SHEA, SANTANIELLO and CALLAHAN, Js.

The defendant in the first case, T, was charged with the crime of risk of impairing the morals of a child. The defendant in the second case, B, was charged with the crimes of sexual assault in the second degree and of risk of impairing the morals of a child. The defendants, following a joint jury trial at which they were both represented by the same attorney, were convicted of the crimes charged, from which they appealed to this court. *Held:*

1. The cumulative effect of the evidence presented at trial and of the inferences which could reasonably have been drawn therefrom was sufficient to support T's conviction of the crime of risk of impairing the morals of a child.
2. The defendants' claim that they were denied their right to effective assistance of counsel because they were represented by the same counsel during trial was unpersuasive; the record here indicated that the defendants had knowingly and intelligently waived their right to separate counsel.
3. The defendants, having failed to object at trial to certain remarks made by the prosecutor during closing argument, thereby waived their right to raise their claim of prosecutorial abuse on appeal.
4. The defendants failed to demonstrate any "exceptional circumstances" which would entitle them to review of their claims, raised for the first time on appeal, that the trial court erred in admitting into evidence certain hearsay statements and certain testimony relating to prior misconduct on the part of B.
5. The defendants failed to provide this court with an adequate record to review their claim that their constitutional rights were violated by the trial court's admission of evidence to the effect that they had remained silent in the face of accusation after having been warned of their right to remain silent.
6. This court could not, on the record here, determine whether, as the defendants claimed, the failure of defense counsel to object to certain evidence and to preserve certain issues for appeal violated their right to effective assistance of counsel.

Argued October 8—decision released December 3, 1985

BEST AVAI

Information, in the first case, charging the defendant with the crime of risk of impairing the morals of a child, and information, in the second case, charging the defendant with the crimes of sexual assault in the second degree and risk of impairing the morals of a child, brought to the Superior Court in the judicial district of Windham, where the cases were joined and tried to the jury before *Dannehy, J.*; verdicts and judgments of guilty on all counts, from which the defendants appealed to this court. *No error.*

F. Mac Buckley, with whom, on the brief, was *Susan K. Smith,* for the appellants (defendant in each case).

Susan C. Marks, special assistant state's attorney, with whom were *Harry S. Gaucher, Jr.,* state's attorney, and, on the brief, *John M. Massameno,* assistant state's attorney, for the appellee (state).

SANTANIELLO, J. After a joint jury trial, the defendants Frederick Barcomb (hereinafter Barcomb) and Stephanie Tyler-Barcomb (hereinafter Tyler-Barcomb) were convicted of impairing the morals of a child in violation of General Statutes § 53-21. Barcomb was also convicted of sexual assault in the second degree in violation of General Statutes § 53a-71 (a) (1). Tyler-Barcomb received a total sentence of not less than two and one-half nor more than five years, and Barcomb received a total effective sentence of not less than five nor more than ten years.

On appeal the defendants claim that: (1) there was insufficient evidence to convict Tyler-Barcomb of the crime charged; (2) they were denied their right to effective assistance of counsel in that they were represented by the same counsel at trial; (3) they were deprived of their right to a fair trial by the remarks of the prosecutor in his closing argument; (4) the trial court erred in admitting hearsay evidence; (5) the trial court abused

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its discretion in allowing cross-examination of Barcomb on prior misconduct; (6) they were denied the full effect of their constitutional right to remain silent by the admission of evidence which indicated that they were silent in the face of accusation; and (7) they were denied their right to effective assistance of counsel by their counsel's failure to make various objections at trial. We find no error.

I

The defendants first claim that there was insufficient evidence to convict Tyler-Barcomb of a violation of General Statutes § 53-21, risk of impairing the morals of a child. Section 53-21 makes it a crime for any person "wilfully or unlawfully [to cause] or [to permit] any child under the age of sixteen years to be placed in such a situation that . . . its morals [are] likely to be impaired, or [to do] any act likely to impair the health or morals of any such child . . . ." " 'In reviewing a sufficiency of evidence claim on appeal the question presented is whether, viewing the evidence favorably to sustaining the verdict, the trier could have reasonably concluded, upon the facts established and the inferences reasonably drawn therefrom, that the cumulative effect of the evidence established guilt beyond a reasonable doubt.' *State* v. *Zayas*, 195 Conn. 611, 620, 490 A.2d 68 (1985); *State* v. *Stepney*, 191 Conn. 233, 255, 464 A.2d 758 (1983), cert. denied, 465 U.S. 1084, 104 S. Ct. 1455, 79 L. Ed. 2d 772 (1984)." *State* v. *Thompson*, 197 Conn. 67, 74, 495 A.2d 1054 (1985). Reviewing the record and the facts adduced at trial, we conclude that there was sufficient evidence to convict the defendant Tyler-Barcomb of the crime charged.

The jury could reasonably have found the following facts. The victim of the crimes, the defendant Tyler-Barcomb's daughter, was between twelve and thirteen years old at the time of the alleged incidents. The

defendant Barcomb, the then live-in boyfriend of Tyler-Barcomb, sexually abused the child a number of times between June, 1980, and June, 1981. Tyler-Barcomb knew what Barcomb had been doing and yet did nothing to prevent further abuse. Tyler-Barcomb also knowingly had sexual intercourse with Barcomb in the presence of her daughter. On the basis of these facts, we cannot say that it was unreasonable for the jury to have concluded that the defendant Tyler-Barcomb violated General Statutes § 53-21.[1]

II

The defendants next claim that they were denied their right to effective assistance of counsel in that they were represented by the same counsel during trial. Essentially they argue that the trial court failed to give them an adequate warning as to the potential for conflict of interest and that the court should not have permitted joint representation under these circumstances. We disagree.[2]

"Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood* v. *Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 67 L. Ed. 2d 220 (1981). But "[r]equiring or permitting a single attorney to represent codefendants . . . is not *per se* violative of constitutional guarantees of effective assistance of counsel. This principle recognizes that in some cases multiple defendants

[1] Because of the victim's youth and ready identifiability, we decline to restate more of the particulars of what the record shows. We have carefully reviewed the evidence according to our usual standards and are fully satisfied that there was sufficient evidence by which the jury could have concluded as it did conclude.

[2] We review this claim because the record is adequate to determine whether the trial court erred in permitting joint representation. We reiterate, however, that the preferred avenue for reviewing ineffective assistance of counsel claims is through habeas corpus proceedings.

can appropriately be represented by one attorney." *Holloway* v. *Arkansas,* 435 U.S. 475, 482, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). Just as a defendant may waive his sixth amendment protections by electing to forego counsel entirely, he may also waive his right to separate representation in a multidefendant prosecution. *State* v. *Marion,* 175 Conn. 211, 218, 397 A.2d 533 (1978). Such a waiver, however, must be knowingly and intelligently made. *Edwards* v. *Arizona,* 451 U.S. 477, 482, 101 S. Ct. 1880, 68 L. Ed. 2d 378, reh. denied, U.S. , 101 S. Ct. 3128, 69 L. Ed. 2d 984 (1981). In multidefendant prosecutions where codefendants share an attorney and where the trial court knows of or reasonably should know of possible conflicts, the trial court is under an affirmative duty to inquire as to the knowing and intelligent nature of the defendants' waiver. *Festo* v. *Luckart,* 191 Conn. 622, 629, 469 A.2d 1181 (1983). The scope of the trial court's inquiry should be thorough enough to warn the defendants of the dangers of dual representation and yet not be overly intrusive into the attorney-client relationship. *Festo* v. *Luckart,* supra, 628; see *People* v. *Lloyd,* 51 N.Y.2d 107, 111, 412 N.E.2d 371 (1980). "If the defendant reveals that he is aware of and understands the various risks and pitfalls, and that he has the rational capacity to make a decision on the basis of this information, and if he states clearly and unequivocally . . . that he nevertheless chooses to hazard those dangers, we would regard his waiver as knowing and intelligent and allow his choice to 'be honored . . . .' " (Citations omitted.) *United States* v. *Curcio,* 680 F.2d 881, 888–89 (2d Cir. 1982), quoting *Faretta* v. *California,* 422 U.S. 806, 834, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

The record in this case indicates that the defendants knowingly and intelligently waived their right to separate counsel. The issue of conflict of interest was raised at three different times during the proceedings

below. On July 24, 1981, the defendants' first court appearance, the defendants' attorney explained to the court that he had gone over possible conflicts of interest with the defendants and that they were satisfied with the dual representation. On October 2, 1981, when the defendants' entered their pleas, the trial court inquired again as to the propriety of joint representation. Barcomb stated at that time that he understood that he was constitutionally entitled to competent representation and that he saw no conflicts. On March 2, 1982, immediately before jury selection, the issue of joint representation was once again raised. On that day, the state's attorney went over in detail possible conflicts of interest including evidence which indicated that Tyler-Barcomb may have been passive due to the threats of Barcomb. The trial court then went over the possible conflicts of interest with the defendants and inquired as to whether they understood the dangers of joint representation. They responded that they understood and that they were satisfied with joint representation. The court inquired still further and asked if they understood that they were waiving their rights to separate representation. They both responded affirmatively and stated that they wanted the one attorney to represent them both.[3]

[3] The following exchange between the defendants and the trial court occurred on March 2, 1982:

"The Court: And you know that you have the right to be represented by counsel, is that correct?

"Mrs. Tyler-Barcomb: Yes.

"The Court: And I've told you what the legal standard is for effective representation?

"Mrs. Tyler-Barcomb: Yes.

"Mr. Barcomb: Yes.

"The Court: And is there anything that you don't understand?

"Mrs. Tyler-Barcomb: No.

"Mr. Barcomb: No.

"The Court: So you're going to waive any claims that you might be able to advance.

III

The defendants have raised five other claims of error. However, because of the inadequacy of the record and the defendants' failure properly to preserve issues for appeal, we cannot review those remaining claims.

Although the rule is well established, it bears repeating that "[o]nly in most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." *State* v. *Evans*, 165 Conn. 61, 69, 327 A.2d 576 (1973). "The policy behind this rule is both ancient and sound and 'does not permit a defendant in a criminal case to fail, whether from a mistake of law, inattention or design, to object to matters occurring during a trial until it is too late for them to be corrected or even considered and then, if the outcome proves unsatisfactory, to raise them for the first time on an appeal.' *State* v. *Taylor*, 153 Conn. 72, 86, 214 A.2d 362 [1965], cert. denied, 384 U.S. 921, 86 S. Ct. 1372, 16 L. Ed. 2d 442 [1966]; *State* v. *Evans*, supra, 66; *State* v. *Tuller*, 34 Conn. 280, 295 [1867]." *State* v. *Baker*, 182 Conn. 52, 56, 437 A.2d 843 (1980). The only two "exceptional circumstances" where we have addressed

"Mrs. Tyler-Barcomb: Yes.

"Mr. Barcomb: Yes, we waive it.

• • •

"The Court: So that this can be an intelligent, understanding and competent waiver?

• • •

"The Court: Well, what decision have you made?

"Mr. Barcomb: That we're going to keep Mr. Morell as our attorney, just one for both of us.

• • •

"Mrs. Tyler-Barcomb: Yes, we're going to keep Mr. Morell as our attorney."

claims for the first time on appeal are "where a new constitutional right not readily foreseeable has arisen between the time of trial and appeal"; *State* v. *Evans*, supra, 70; e.g., *State* v. *Vars*, 154 Conn. 255, 271–72, 224 A.2d 744 (1966); and "where the record adequately supports a claim that a litigant has clearly been deprived of a fundamental constitutional right and a fair trial." *State* v. *Evans*, supra; e.g., *State* v. *Wright*, 197 Conn. 588, 595, A.2d (1985). Outside of these narrow circumstances and cases of plain error, we will address only those claims raised at trial. Practice Book § 3063; *State* v. *Gooch*, 186 Conn. 17, 18, 438 A.2d 867 (1982).

The defendants in their third claim argue that certain remarks made by the prosecutor in his closing arguments deprived them of their right to a fair trial. The prosecutor twice referred to Barcomb as "a kind of beast" and once alluded to Barcomb's conduct as akin to that of "an animal" when caged. The defendants made no objection to those remarks during or after the prosecutor's argument and requested no curative charge.

We have held on a number of occasions that where a criminal defendant does not object and take exception to allegedly prejudicial remarks of the state's attorney, either at the time they were made or at the close of argument, he waives his right to press the claimed error on appeal. *State* v. *Lubesky*, 195 Conn. 475, 484, 488 A.2d 1239 (1985); *State* v. *Malley*, 167 Conn. 379, 387, 355 A.2d 292 (1974). Also, where counsel does not request a curative charge or seek a mistrial on the basis of alleged prosecutorial misconduct, we have presumed that defense counsel did not view the remarks as so prejudicial that his client's right to a fair trial was seriously jeopardized. *State* v. *Lubesky*, supra; *State* v. *Falcone*, 191 Conn. 12, 23 n.13, 463 A.2d 558 (1983). We see no reason here to depart from these established

rules. On the basis of the record, we cannot say that the prosecutor's remarks were so abusive as to raise the defendants' claim to a level where they have "clearly been deprived of a fundamental constitutional right and a fair trial."[4] *State* v. *Evans*, supra. As a result, we find that the defendants have waived their right to raise on appeal this claim of prosecutorial abuse.

The defendants maintain as their fourth and fifth claims of error that the trial court abused its discretion in admitting into evidence hearsay statements and testimony concerning Barcomb's prior misconduct. The hearsay statements were introduced under the "constancy of accusation" exception to the hearsay rule and were part of the state's attempt to corroborate the victim's testimony. The misconduct evidence related to Barcomb's employment history as a constable for the town of Killingly. Defense counsel failed to object to any of this evidence and thus the alleged errors concerning the admission of such evidence were never before the trial court.

Applying the *Evans* rule to the defendants' fourth and fifth claims, we conclude that the issues are not reviewable. The defendants have not demonstrated any "exceptional circumstances" to warrant review of these claims. They have not raised any fundamental constitutional rights in regard to the trial court's admission of the prior misconduct evidence and have put forward no colorable constitutional claims concerning the admission of the hearsay statements.[5] See *State* v. *Baker*, supra, 55–57.

[4] We note that we do not in any way condone the use of the language of the prosecutor in this case. All state's attorneys should be circumspect in their characterization of criminal defendants.

[5] The defendants' claim concerning the hearsay testimony is primarily that the trial court abused its discretion in making an evidentiary ruling. The defendants have also rather half-heartedly argued that the admission

The defendants have claimed as a sixth assignment of error that their constitutional rights were violated by the admission of evidence indicating that they were silent in the face of accusation after being warned of their right to remain silent. They cite as authority *Doyle* v. *Ohio,* 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), and *State* v. *Briggs,* 179 Conn. 328, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980). At trial, two state police officers testified that they went to the defendants' home on June 15, 1981, to talk with them about the accusations against them. The officers stated that when they went to the home, the defendants said that they did not want to talk. Sometime during the visit, the defendants were informed of their constitutional rights, but the defendants were not under arrest at the time. Defense counsel did not object to the police officers' testimony.

Ordinarily, where the record adequately supports a claim that the defendant was clearly deprived of his fifth amendment rights, we will review such a claim despite the failure to raise the issue at trial. See *State* v. *Briggs,* supra, 335; *State* v. *Zeko,* 177 Conn. 545, 418 A.2d 917 (1979). The record in this case, however, is unclear as to whether the defendants have made out a viable fifth amendment claim. The United States Supreme Court held in *Doyle* v. *Ohio,* supra, that when

of hearsay testimony violated their right to confrontation and a fair trial. Other than this bald assertion, the defendants have not seriously pressed this claim on appeal. They have not explained why, under the circumstances of this case, their rights to confrontation and a fair trial were abridged by the trial court. Nor have they set out any legal support for their assertion. "Putting a constitutional tag on a nonconstitutional claim will no more change its essential character than calling a bull a cow will change its gender." *State* v. *Gooch,* 186 Conn. 17, 18, 438 A.2d 867 (1982). We have previously held that the well established constancy of accusation exception to the hearsay rule does not violate a defendant's constitutional right of confrontation. See *State* v. *Brigandi,* 186 Conn. 521, 532-33, 442 A.2d 927 (1982).

an accused is in police custody and has been given his *Miranda* warnings, evidence of his silence is inadmissible for both impeachment and substantive purposes. Id., 619. Since *Doyle*, the Supreme Court has also held that where a criminal defendant is not in official custody and has not yet been given his *Miranda* warnings, admission of evidence indicating silence in the face of accusation will not violate the defendant's fifth amendment rights. *Jenkins* v. *Anderson*, 447 U.S. 231, 100 S. Ct. 2124, 65 L. Ed. 2d 86 (1980). Because the testimony of the two state police officers in this case was sparse and disjointed, it is impossible to tell whether the defendants were given their *Miranda* rights before or after they stated that they did not wish to speak with the officers. Thus, we are unable to tell from this record whether under *Doyle* and *Jenkins* there has been any deprivation of a fundamental constitutional right. It is incumbent upon an appellant to ensure that we are provided with an adequate record to review the claims of error. Practice Book § 3060D; *State* v. *Thompson*, 197 Conn. 67, 81, 495 A.2d 1054 (1985); *Barra* v. *Ridgefield Card & Gift Gallery, Ltd.*, 194 Conn. 400, 407, 480 A.2d 552 (1984). We will not presume error.

Finally, the defendants argue that the failure of defense counsel to object to various testimony and preserve issues for appeal violated their right to effective assistance of counsel " 'We have repeatedly held that ineffective assistance claims are more properly pursued in a petition for a new trial or a writ of habeas corpus.' *State* v. *Jacobowitz*, 194 Conn. 408, 413, 480 A.2d 557 (1984). 'Absent the evidentiary hearing available in the collateral action, review in this court of the ineffective assistance claim is at best difficult and sometimes impossible.' *State* v. *Mason*, 186 Conn. 574, 578–79, 442 A.2d 1335 (1982); *State* v. *Tirado*, 194 Conn. 89, 93, 478 A.2d 606 (1984)." *State* v. *Stanley*, 197 Conn. 309,

313, 497 A.2d 46 (1985). On the record before us, we cannot determine whether the defense counsel's performance was reasonably competent or whether the alleged incompetence contributed to the defendants' conviction.[6] See *State* v. *Vitale*, 197 Conn. 396, 413, 497 A.2d 956 (1985).

There is no error.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* GERALD GONZALEZ (11068)

HEALEY, SHEA, DANNEHY, SANTANIELLO and CALLAHAN, Js.

Convicted, following a jury trial, of the crime of robbery in the second degree, the defendant, who had presented an alibi defense at trial, appealed. He claimed that the state's attorney, during closing argument to the jury, had improperly commented on his failure to produce certain witnesses in support of his alibi. *Held* that, although the trial court erred in not striking the challenged comments, the state having failed to seek an advance ruling from that court as to the propriety of such an argument, the error was, under all of the circumstances here, harmless.

Argued October 11—decision released December 3, 1985

Information charging the defendant with the crime of robbery in the second degree, brought to the Superior Court in the judicial district of Fairfield and tried to the jury before *Cretella, J.;* verdict and judgment of guilty, from which the defendant appealed to this court. *No error.*

Erskine D. McIntosh, assistant public defender, with whom, on the brief, was *Joette Katz,* public defender, for the appellant (defendant).

---

[6] Despite our decision finding no error, the defendants are not precluded from raising their ineffective assistance of counsel claim in an appropriate collateral proceeding. *State* v. *Stanley*, 197 Conn. 309, 313, 497 A.2d 46 (1985).

APPENDIX A (2)

Appellants' Motion To Reargue dated December 12, 1985

SUPREME COURT

of the State of Connecticut

No. 11362

No. 11363

State of Connecticut v. Stephanie Tyler-Barcomb and State of Connecticut v. Frederick S. Barcomb, Jr.

The appellants, Tyler-Barcomb and Barcomb, Jr., pursuant to Rules 3111, 3111A and 3112 of the Rules of the Supreme Court, respectfully request this Court to hear reargument on and to reconsider the sixth assignment of error decided by this Court on December 3, 1985. The appellants' claim is that this Court was incorrect in stating that there was not a clear or adequate record to support their claim of a deprivation of their fifth amendment

rights.

Attached hereto are Appellants' 3098 Statement and Appellants' Memorandum of Law in Support of Motion to Reargue stating their claim with specificity.

THE APPELLANTS

BY: F. MAC BUCKLEY

F. MAC BUCKLEY

Their Attorney

Buckley & Santos, P.C.

51 Russ Street

Hartford, CT. 06106

(203) 249-6548

APPENDIX A (3)

Decision of the Connecticut Supreme Court denying Appellants' Motion to Reargue

NO. 11362/11363

State of Connecticut v. Stephanie Tyler-Barcomb

State of Connecticut v. Frederick S. Barcomb, Jr.

THE MOTION OF THE DEFENDANTS FILED DECEMBER 12, 1985 TO REARGUE HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED DENIED.

BY THE COURT,

FRANCIS J. DRUMM, JR.

CHIEF CLERK

APPENDIX A (4)

Appellants' Motion For A Stay Of Execution Pending A Decision Of The United States Supreme Court Dated December 30, 1985

SUPREME COURT

of the State of Connecticut

No. 11362

No. 11363

State of Connecticut v. Stephanie Tyler-Barcomb and State of Connecticut v. Frederick S. Barcomb, Jr.

The Appellants, Tyler-Barcomb and Barcomb, Jr., pursuant to Rule 3068 of the Rules of the Supreme Court, respectfully request this Court to grant a stay of execution pending a decision in this case by the United States Supreme Court. Counsel makes the following claims in support of said Motion:

1. The Appellants, by undersigned counsel, are filing a petition for a writ of certiorari before the United States Supreme Court within sixty (60) days of the entry of judgment in this matter in accordance with Rule 20 of the United States Supreme Court Rules.

2. Counsel represents further that this petition is not frivolous or taken "only for delay".

3. Both Appellants are presently enlarged on real estate and surety bonds, are employed, and are raising three young children, ages 12, 10 and 2.

4. The Appellants have complied in all respects with their conditions of bond on appeal and have had no arrests or problems of any nature with law enforcement authorities while their appeals have been pending.

5. Appellants, through counsel, in-

tend to raise two serious constitutional issues in said petition involving the joint representation of trial counsel and the issue of the introduction into evidence of their post-Miranda silence.

THE APPELLANTS

BY: F. MAC BUCKLEY

F. MAC BUCKLEY

Their Attorney

APPENDIX A (5)

Court's Order Concerning Stay of Execution

NO. 11362/11363

State of Connecticut v. Stephanie Tyler, a/k/a Stephanie Tyler Barcomb

State of Connecticut v. Frederick Barcomb

THE MOTION OF THE DEFENDANTS FILED DECEMBER 30, 1985, FOR A STAY OF EXECUTION PENDING A DECISION OF THE UNITED STATES SUPREME COURT,

HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY

ORDERED GRANTED UNTIL EXPIRATION OF THE TIME TO PETITION THE UNITED STATE'S SUPREME COURT OR, IF A PETITION IS FILED, UNTIL THAT COURT HAS TAKEN ACTION IN THIS CASE, EITHER BY A DENIAL OF THE PETITION FOR CERTIORARI OR, IF APPLICABLE, BY A DECISION ON THE MERITS OF THE APPEAL.

BY THE COURT,

FRANCIS J. DRUMM, JR.

CHIEF CLERK

APPENDIX B (1)

Excerpts From Trial Transcript Concerning Court's Inquiry On Conflicts of Interest Problem With Joint Representation

I. July 24, 1981 Hearing

THE COURT: Do you represent Stephanie Tyler and Frederick Barcomb?

MR. MORELL: At the present time I represent both of them, yes.

THE COURT: Is there any conflict --

MR. MORELL: Not at the present time.

THE COURT: --in dual representation?

MR. MORELL: Not at the present time. I explained to them the question of representation and they are both satisfied at this time that I represent them both.

THE COURT: Have you discussed this with Mr. Morell?

MS. TYLER: Yes.

THE COURT: And you see no conflict in his representing both of you?

MS. TYLER: No.

II. October 2, 1981 Hearing

(At the hearing in the above-entitled matter the Petitioners were called up one at a time for plea. Stephanie Tyler pleaded not guilty to the one count in the information charged against her and, after requesting a trial by jury, the case was assigned to the jury trial list. Mrs. Tyler then returned to her seat in the gallery and Mr. Barcomb's case was called. Frederick S. Barcomb, Jr. pleaded not guilty to the three counts in the information charged against him and, after requesting a trial by jury, the following occurred:)

THE COURT: Are these matters related in any way, Stephanie Tyler and Barcomb?

MR. OLIVER: Yes, your Honor.

MR. MORELL: They are related.

THE COURT: Do you understand, Mr.

Barcomb, that, constitutionally, you are entitled to competent representation --

MR. BARCOMB: Yes.

THE COURT: -- by an attorney? Do you see any conflict in Mr. Morell's representing you and Stephanie Tyler?

MR. BARCOMB: No.

THE COURT: Are you sure of that?

MR. BARCOMB: Yes.

III. March 2, 1982 Hearing

MR. GAUCHER: As a preliminary comment to the Court Your Honor, I should indicate that at the present time, the defendant Stephanie Tyler -- Stephanie Tyler-Barcomb -- is charged with one count. That of the risk of impairing the morals of a child. Both (inaudible) of that statute are charged in the information that she willfully permitted the child to be placed in a position where her morals

were likely to be impaired, as well as that she committed actions that were likely to impair those morals. The defendant Frederick Barcomb, at the present time, or initially, was charged with three counts. The first count, sexual assault in the second degree; second count, sexual assault in the third degree; and in the third count, risk of impairing the morals of the child. I informed Mr. Morell this morning that the State was filing a substitute information this morning and which will in fact eliminate the second count that presently appears in the information. It will not alter the other two counts as they presently appear, so that the information in fact that I'm going to file and that the defendant will also be put plea to, will cover the present first count and the present third count, sexual assault in the second degree and risk of impairing

the morals of a child. Now in the course of the trial the evidence will -- to be presented by the Court -- by the State, will tend to show that the regard to Stephanie Tyler, the mother of the alleged victim in this case, that in the first place, she was -- the evidence will tend to show that she played a more passive role in the entire development of the circumstances here. That the defendant Barcomb was the more active actor with regard to the charges that are alleged. More particularly, there will be some evidence as testified to by the child involved that will tend to show that the mother was afraid of the defendant Barcomb who was a member of that household that consisted of Stephanie Tyler-Barcomb, Frederick Barcomb and the twelve year old child, Amy Tyler, the child of Stephanie Tyler. That will tend to show that she was afraid to the

point of she resisted interfering or attempting to disuade the defendant Barcomb from carrying on the actions that are alleged that he did carry out. The evidence will also show that on a couple of occasions the mother in fact took some positive action to prevent the actions on the part of defendant Barcomb by telling him and arguing with him not to molest the youngster at that particular time. Now, in the light of these actions, the State fears that -- or feels that this is a situation where -- where you -- a particular defendant would stand to benefit significantly from counsel educing certain evidence or pursuing certain arguments, plausible arguments, would be to the detriment of the co-defendant and as long as the defendants, both of them, especially Stephanie Tyler-Barcomb, is fully aware that there might be some evidence that counsel representing

solely her would want to take advantage of but cannot without hurting the cause of his co-defendant Barcomb, as long as she is fully aware of that and that Barcomb himself is aware, so that both of them in waiving their right to having their own separate counsel are doing it with full knowledge of the course that the State is going to set itself about.

THE COURT: Did you hear what Mr. Gaucher said?

MRS. TYLER-BARCOMB: Yes.

MR. BARCOMB: Yes.

THE COURT: And do you understand that a conflict of interest can be present whenever one defendant, presumably that would be you, stands to gain significantly by a counsel educing probative evidence or advancing plausible arguments that are damaging to the cause of a co-counsel that the counsel is also representing. Now do

you understand that Mr. Barcomb?

MR. BARCOMB: Yes I do.

THE COURT: And have you discussed this with Mr. and Mrs. Barcomb.

MR. MORELL: We have met as (inaudible) I met with Mrs. -- Mr. and Mrs. Barcomb about two weeks ago. Spent a considerable period of time reviewing this case with them and as to whether they should or should not get other attorneys.

THE COURT: And what was your decision?

MR. BARCOMB: We're satisfied with Mr. Morell.

THE COURT: Now Mr. Gaurcher has given you a preliminary statement of what the evidence will be. And do you know that now, and do you know it Mr. Barcomb?

MR. BARCOMB: I realize what he said, yes.

THE COURT: And you know that you have

the right to be represented by counsel, is that correct?

MRS. TYLER-BARCOMB: Yes.

THE COURT: And I've told you what the legal standard is for effective representation?

MRS. TYLER-BARCOMB: Yes.

MR. BARCOMB: Yes.

THE COURT: And is there anything that you don't understand?

MRS. TYLER-BARCOMB: No.

MR. BARCOMB: No.

THE COURT: So you're going to waive any claims that you might be able to advance.

MRS. TYLER-BARCOMB: Yes.

MR. BARCOMB: Yes we waive it.

THE COURT: So you fully understand what your rights are and you've discussed it with them Mr. Morell?

MR. MORELL: I have.

THE COURT: So that this can be an intelligent, understanding and competent waiver?

MR. MORELL: The decision they'll have to make, but I did discuss it with them.

THE COURT: Well, what decision have you made?

MR. BARCOMB: That we're going to keep Mr. Morell as our attorney, just one for both of us.

THE COURT: All right.

MR. GAUCHER: Could we hear this also from Mrs. Tyler so that the microphone will pick it up.

THE COURT: Yes.

MRS. TYLER-BARCOMB: Yes, we're going to keep Mr. Morell as our attorney.

THE COURT: All right.

APPENDIX B (2)

Excerpts From Trial Transcript Concerning State Police Testimony on Meetings With Petitioners and Advise of Rights to Petitioners

I. The First Visit - Saturday, June 13, 1981 (T. 3/4/82 at p. 200).

Trooper Hardell:

A. During the daytime, I got together with Sergeant Heroux and we wanted to talk with Mrs. Tyler. We hadn't fully explained all the charges against them. Mrs. -- - Sergeant Heroux wanted to talk with Mrs. Tyler, explain the situation, and give her a chance to cooperate, if that's what she chose to do. We went to my home and telephoned and Mrs. Tyler refused. So we immediately went to the home and spoke with both Fred and Stephanie. We informed them of their constitutional rights at that time.

Q. And did you have any other conversation with the two of them then?

A. Yes. We said that --- Stephanie was very very upset. Almost uncontrollably so. She had difficulty signing the rights form. We explained briefly what we had done, why we had done it, told them that we would be getting back to them further and suggested they contact an attorney. The main purpose for going there was to give them an opportunity to discuss the situation with us and give their side of it and they refused to do so.

II. <u>The Second Visit - Monday, June 15, 1981 (T. 3/9/82 at pp. 263-264).</u>

Q. What was the next thing you did regarding this case after Saturday, June 13th?

Sergeant Heroux:

A. Was on Monday--well, Monday morning, I worked with Trooper Hardell again

and I contacted Mrs. Tyler by telephone and asked her if she would be willing to speak with Trooper Hardell and I alone. And she said that she would not. And that I asked her if she would be willing to talk to us if we came to her home and she said that she would be.

Q. So what did you do?

A. Trooper Hardell and I then went to Mrs. Tyler's home and spoke with she and Mr. Barcomb, just explaining that there had been allegations made and was there anything that either of them would like to say on their behalf. Mrs. Tyler was very upset and Mr. Barcomb was upset, too. Mrs. Tyler had no --- didn't wish to talk about the allegations. They were both advised of their rights. And Mr. Barcomb did make a remark about the fact that the only time that he had taken Amy's pants down was to spank --- to spank her on occasion,

but that was the extent of his touching her. We ---

Q. What --- did you make any observations with regard to Mrs. Tyler's demeanor as you gave her her rights?

A. Yes, sir. I gave --- she was very nervous and I gave her --- I had her sign a waiver saying that she understood her rights. And her hands were shaking. She was --- she was physically upset.

Supreme Court, U.S.
FILED
MAR 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1417

In The

Supreme Court Of The United States

JANUARY TERM, 1986

STEPHANIE TYLER-BARCOMB and FREDERICK S. BARCOMB, JR.,
Petitioners,

v.

STATE OF CONNECTICUT,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF CONNECTICUT

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18 pp

QUESTIONS PRESENTED

I. WHETHER THE TRIAL COURT'S EXTENSIVE CANVASS OF THE PETITIONERS CONCERNING THEIR WAIVER OF THE RIGHT TO SEPARATE COUNSEL WAS ADEQUATE UNDER THE SIXTH AMENDMENT.

II. WHETHER THE CONNECTICUT SUPREME COURT PROPERLY REFUSED TO REVIEW THE PETITIONERS' CLAIM THAT EVIDENCE OF THEIR SILENCE IN THE FACE OF ACCUSATION WAS ERRONEOUSLY ADMITTED WHERE THE CLAIM WAS NOT REVIEWED BECAUSE PETITIONERS DID NOT PRESENT AN ADEQUATE RECORD TO SUPPORT IT.

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Rules of Court

Conn. Practice Book § 3060D .10

RULE INVOLVED

Connecticut Rules of Court § 3060D

The supreme court may reverse or modify the decision of the trial court if it determines that the decision is clearly erroneous in view of the evidence and pleadings in the whole record.

If the supreme court deems it necessary to the proper disposition of the cause, it may remand the case for a further articulation of the basis of the trial court's decision.

It is the responsibility of the appellant to provide an adequate record for review.

OPINION BELOW

The opinion of the Connecticut Supreme Court (Pet. App. 2a-13a) is reported at 197 Conn. 666, ___ A.2d ___ (1985).

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on December 3, 1985. A motion to reargue was denied on December 20, 1985. The petition for a writ of certiorari was filed on February 18,1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

STATEMENT

Following a joint jury trial, the petitioners Barcomb and Tyler-Barcomb were convicted of impairing the morals of a child. Barcomb also was convicted of sexual assault in the second degree.

Both petitioners desired to be, and were, represented by one attorney at trial. The issue of potential conflict of interest arising from this joint representation was raised on three separate occasions prior to trial. (Pet. App. 22a-32a).

On July 24, 1982, the petitioners' first court appearance, the petitioners' attorney explained to the court that he had gone over possible conflicts of interest with the petitioners and that they were satisfied with the dual representation. On October 2, 1981, when the petitioners' entered their pleas, the trial court inquired again as to the propriety of joint representation. Barcomb stated at that time that he understood that he was constitutionally entitled to competent representation and

that he saw no conflicts. On March 2, 1982, immediately before jury selection, the issue of joint representation was once again raised. On that day, the state's attorney went over in detail possible conflicts of interest including evidence which indicated that Tyler-Barcomb may have been passive due to the threats of Barcomb. The trial court then went over the possible conflicts of interest with the petitioners and inquired as to whether they understood the dangers of joint representation. They responded that they understood and that they were satisfied with joint representation. The court inquired still further and asked if they understood that they were waiving their rights to separate representation. They

both responded affirmatively and stated that they wanted the one attorney to represent them both. (Pet. App. 6a-7a)

During trial, two Connecticut State Troopers testified regarding a meeting they had with the petitioners prior to their arrest. The petitioners raised no objections to this testimony at trial.

On appeal to the Connecticut Supreme Court, the petitioners claimed that the trial court failed to give them an adequate warning as to the potential for conflict of interest arising from joint representation. They also claimed that the troopers' testimony had been erroneously admitted, as it revealed that the petitioners were silent in the face of accusation after being warned of

their right to remain silent, in violation of Doyle v. Ohio, 426 U.S. 610 (1976).

Regarding the petitioners' first claim, the Connecticut Supreme Court found that the record established that the petitioners knowingly and intelligently waived their right to separate counsel.

The Connecticut Supreme Court also found that, although review of the petitioners' claim invoking Doyle v. Ohio, supra, was not precluded by their failure to raise it at trial, it was precluded by the absence of an adequate record for review. The Supreme Court stated:

> The record in this case . . . is unclear as to whether the defendants have made out a viable fifth amendment claim. . . . Because the testimony of the two state police officers in this case was sparse and disjointed, it is impossible

> to tell whether the defendants were given their Miranda rights before or after they stated that they did not wish to speak with the officers. Thus, we are unable to tell from this record whether under Doyle and Jenkins there has been any deprivation of a fundamental constitutional right. It is incumbent upon an appellant to ensure that we are provided with an adequate record to review the claims of error . . . We will not presume error.

State v. Tyler-Barcomb, 197 Conn. at 675-76, Pet. App. at 11a-12a.

The petitioners' convictions were unanimously affirmed by the Connecticut Supreme Court which subsequently denied, without further opinion, their motion to reargue.

ARGUMENT

1. The petitioners initially claim that the trial court's instructions and inquiries regarding their desire to be represented by on attorney were insufficient to form the basis for a knowing and intelligent waiver of their sixth amendment rights.

The issue of whether codefendants may appropriately be represented by one attorney has been resolved by this Court in Holloway v. Arkansas, 435 U.S. 475 (1978). Similarly, the general issue of what action is necessary to constitute a knowing and intelligent waiver of Sixth Amendment protections has received extensive consideration by this Court. See, e.g., Edwards v. Arizona, 451 U.S. 477 (1981). The petitioners do not suggest that this case involves any

unique circumstances removing it from the ambit of established case law pertaining to the knowing and intelligent waiver of sixth amendment rights. Furthermore, as demonstrated by the petitioners' failure to cite any case law apart from two Connecticut Supreme Court decisions, the issue they raise is not a legal question on which various courts have divided.

In Edwards v. Arizona, supra, 451 U.S. at 482, the existence of a knowing and intelligent waiver was found to depend in each instance "upon the particular facts and circumstances surrounding that case." The petitioners do not suggest that the Connecticut Supreme Court applied an erroneous standard for determining waiver in this case; rather, they contest the court's

conclusion that the facts were sufficient to demonstrate that they understood the risks involved in joint representation.

Consideration of the petitioners' claim would add nothing of precedential value to Sixth Amendment jurisprudence and would result in the expending of this Court's resources to resolve a question wholly dependent on a unique factual context. See Wolfe v. North Carolina, 364 U.S. 177, 196 (1960). The claim does not warrant further review.

2. The petitioners' second claim is that the Connecticut Supreme Court's determination that the record was inadequate for review of their fifth amendment claim was incorrect.

Under Connecticut case law and rules of court, the state Supreme Court

is not bound to consider a claim of error which is not supported by an adequate record. It was the petitioners' burden to ensure that the Connecticut Supreme Court was provided with an adequate record to support their Fifth Amendment claim. State v. Thompson, 197 Conn. 67, 81, 495 A.2d 1054 (1985); Barra v. Ridgefield Card & Gift Gallery, Ltd., 194 Conn. 400, 407, 480 A.2d 557 (1984); Connecticut Rules of Court § 3060D. The Connecticut Supreme Court's refusal to consider a claim which is not supported by an adequate factual record rests on independent and adequate state grounds which preclude further review by this Court. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978).

Furthermore, as the petitioners now concede, their constitutional claim

depends on the existence of two meetings between the state troopers and the petitioners, one on June 13, 1981 and one on June 15, 1981. Petition at 15-16. The Connecticut Supreme Court found, however, that only the June 15 meeting occurred.[1] State v. Tyler-Barcomb,

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[1] The Connecticut Supreme Court also found that the testimony relating to that meeting was so "sparse and disjointed" as to render any conclusion regarding the chronology of events impossible. The petitioners now concede that viewed separately, the testimony of each trooper is ambiguous as to whether the petitioners' refusal to comment occurred before or after they were given Miranda rights. (Petition at 15-16). They claim, however, that it is "extremely clear" from the transcript that two separate meetings occurred. Neither trooper, however, testified that two meetings occurred. Trooper Hardell described a meeting, which he said occurred June 13, at which the petitioners and Troopers Hardell and Heroux were present. T. at 200-201. Trooper Heroux testified that she did not meet with the petitioners on June 13, but described a June 15 meeting involving both troopers and the petitioners. T. at 263-64. Trooper Heroux's description of the "June 15 meeting" and Trooper Hardell's description of the "June 13 meeting" were quite similar. T. at 201-202; 263-264.

197 Conn. at 675; Pet. App. at 11a. The resources of this Court ought not to be spent in resolving a purely factual dispute which would add nothing either to the scope of the holdings in Doyle v. Ohio, 426 U.S. 610 (1976) and Jenkins v. Anderson, 447 U.S. 231 (1980), or to Fifth Amendment jurisprudence generally.[2]

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[2] If this Court were to grant review on this issue, the State assumes it would limit its consideration to the question of whether the Connecticut Supreme Court was required to review the claim. If the claim were found to be reviewable, the State further assumes this Court would remand the case to the Connecticut Supreme Court to consider the merits. Accordingly, the State does not address the merits of the Doyle claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THE RESPONDENT
STATE OF CONNECTICUT

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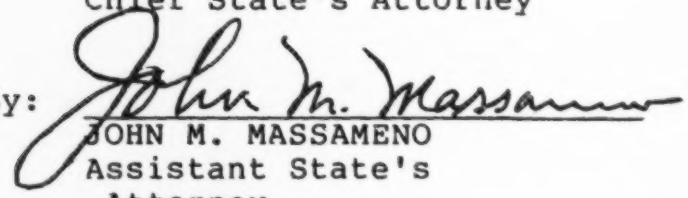
By: 
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